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SUBJECT: EPISODE III - - THE DEFENSE BAR STRIKES BACK

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¶1. Summary: In 2007, the U.S. Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training (DOJ/OPDAT) and the Government of Georgia (GOG) conducted a series of in-court trial advocacy skills workshops using what will soon be Georgia's new Criminal Procedure Code (CPC) for a cadre of 30 prosecutor trainers from throughout Georgia. These prosecutors routinely defeated American Bar Association/Rule of Law Initiative (ABA/ROLI) trained defense lawyers in mock jury trials held in Tbilisi, Georgia. After conducting mock trials in Tbilisi, the cadre of trainers taught the advocacy skills to more than 600 of their prosecutorial colleagues. In 2008, DOJ/OPDAT and the GOG's Office of Public Prosecution Service (OPP) embarked upon a year-long effort to visit each region, buttress the cadre's teaching efforts, respond to questions, and, in connection with ABA/ROLI trained defense lawyers, provide the prosecutors with an opportunity to practice their skills in live mock jury trials. Initially, the regional defense bar uniformly defeated the regional prosecutors. The prosecutors lost, in total, ten mock jury trials in the Gori and Mtskheta regions. The prosecutors demonstrated theoretical knowledge of the trial advocacy principles, but could not translate this knowledge into practice to secure convictions. This created a general sense of frustration among the prosecutors and growing concern in the OPP where key individuals voiced concern that the prosecutors would not be able to convict individuals using the new CPC. Recently, however, the prosecutors have demonstrated a renewed commitment to learning these new and challenging trial advocacy skills. This renewed commitment has resulted in successful convictions in six of ten mock trials held in the Rustavi and Akhaltsikhe regions. These convictions have restored the prosecutors' confidence in their trial skills and their willingness to accept the changes to the criminal procedure process that the new CPC will bring. End Summary.

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Do, or Do Not. There is No Try.  
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¶2. In order to gauge the prosecutor trainers' success in teaching trial advocacy skills to their colleagues, DOJ/OPDAT and the OPP scheduled a series of regional trial advocacy seminars. The regional prosecutors readily admitted that their local trainers taught them the basic trial advocacy skills. In general, the prosecutors knew how to do opening statements and closing arguments. They also understood, broadly, how to conduct direct and cross examinations. However, they struggled with specific examination issues.

¶3. For example, they had difficulty using the head note technique in direct examination. The head note technique highlights the area in which the prosecutor wants to inquire. For example, in a case involving a white BMW, the prosecutor would simply say, "Let's talk about the white BMW that you saw." The head note gives both the witness and the jury a roadmap for the scope of questions the prosecutor intends to ask.

14. Likewise, they struggled with using cross examination to cull from the witness facts to buttress their closing argument. Cross examination succeeds where a prosecutor obtains admissions from a witness to support a closing argument. If a prosecutor wants to argue that the witness's testimony is biased because he and the defendant are friends, the prosecutor needs the witness to admit that he and the defendant have known each other for twenty years. If the defendant and witness have, in fact, known each other for twenty years, this is a fact that the witness cannot deny. In the closing argument, the prosecutor can use this admitted fact to demonstrate the witness's bias. However, where the prosecutor asks the witness to characterize his relationship with the defendant, the witness will rarely admit the friendship. Instead, she will simply claim that she and the defendant are associates. By failing to obtain the factual admission, the prosecutor removes from his quiver the "bias" argument because the witness has already characterized the relationship for the jury. As a result of these challenges, the prosecutors became frustrated and began to lose faith in their ability to successfully conduct cross examination.

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Lost a Planet, Master Obi-Wan Has. How Embarrassing.  
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15. Despite these problems, the prosecutors persevered and participated in five mock jury trials in Gori and Mtskheta - - a total of ten trials - - but lost each one. The juries and judges routinely said that the prosecutors were more proficient at presenting their cases, but failed to present sufficient evidence to convict the defendants. In other words, both the judges and the juries believed that the prosecutors knew the trial advocacy skills better, but simply did not properly use them to identify the

TBILISI 00000900 002 OF 004

testimony or the objective evidence that the jury needed to convict the defendant. Consequently, the jurors concluded that, based on the presumption of innocence and the absence of evidence to prove the defendant guilty beyond a reasonable doubt, they must acquit the defendant.

16. These successive losses shook the prosecution. They were embarrassed because they are not used to losing. Under the current soviet-style inquisitorial trial process, prosecutors routinely convict individuals. The prosecutors grew concerned that notwithstanding the comments by the juries and judges, they would not be as successful under the Western-style, adversarial system that the CPC embodies. They began to complain that the new CPC put them at a competitive disadvantage and many voiced concern that the new CPC would allow guilty people to go free even though the prosecutors gave their best effort. In fact, the OPP's Deputy Chief of Administration expressed concern that the prosecutors could not learn the necessary skills before the CPC would be enacted. She was concerned that Georgian society would be victimized by criminals that the new system allowed to go free because the prosecutors had not mastered their skills. She inquired into whether additional practice might be necessary in order for the prosecutors to learn the skills in a timely manner. Looking at the previous year's training seminar and the anticipated time remaining, she inquired into whether the prosecutors should convene special monthly meetings among themselves to practice the necessary skills.

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Train Yourself to Let Go of  
Everything You Fear to Lose.  
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17. Based on the prosecutors' string of losses, DOJ/OPDAT and the OPP examined the training material. Moreover, DOJ/OPDAT and ABA/ROLI examined the problem to determine if it was too biased in the defendant's favor or provided the prosecutors with too little evidence to prove the defendant guilty beyond a reasonable doubt. Finally, the OPP discussed with the prosecutors the need to focus on learning the material and understanding how to use the adversarial skills to establish evidence satisfying their burden of proof beyond a reasonable doubt to successfully convict individuals. The OPP emphasized that simply understanding the material in theory would

not help them use the skills to convict defendants. Instead, they needed to learn how to practically use the material and ask better questions to gain a better understanding of the adversarial skills. Based on these efforts, the prosecutors renewed their commitment to learning the trial advocacy skills.

18. The prosecutors concentrated on improving their opening statement and closing argument skills. In opening statement practice, they concentrated on identifying a case theme that provided the moral support for convicting a defendant. Additionally, they noted key witness testimony and objective evidence the jury should anticipate hearing during the trial. In other words, they "connected the dots" of evidence for the jury in the opening statement. They described how a key witness observed a vehicle with unique damage that the police officer later learned was the defendant's vehicle. They began to characterize defense witnesses in the opening statement so that the jury began to form an opinion of the witness prior to his or her testimony. Similarly, they honed their closing argument skills. They highlighted the evidence adduced during the trial to prove to the finder of fact, whether it be judge or jury, that the defendant is guilty of the charged crimes. Rather than simply appealing to the jury's emotions, they concluded for the jury that witness testimony and objective evidence -- such as a gun or a damaged vehicle -- pointed to the defendant's guilt beyond a reasonable doubt. Finally, they used the absence of a logical explanation on the defendant's part to argue that he must be guilty of the charged crime.

19. The prosecutors also focused on improving their direct examination skills. They practiced using head notes to highlight for the judge, jury, and witness the area in which the prosecutor intended to inquire. This improved the witness's ability to focus on the questions and give precise answers to the prosecutor's questions. In practice seminars before the Rustavi and Akhaltsikhe trials, the prosecutors learned from each other the importance of head notes. By using head notes, they could randomly question their colleagues and receive logical answers to their questions because the witness, without practicing with the prosecutor, knew the topic the prosecutor wanted to discuss. Additionally, they incorporated loop back questions into their arsenal. Loop back questions incorporate a witness's answer into a subsequent question. If a witness admits that he saw a white BMW, the loop back technique instructs the prosecutor to asking questions such as where did you see the white BMW? Who entered the white BMW, or how did the white BMW leave the scene. Using this technique, the prosecutors emphasize for the judge and/or the jury the white BMW's importance in the crime. This focuses the jury on the key point of the

TBILISI 00000900 003 OF 004

witness's testimony so that they remember this testimony when a later witness further describes the white BMW's significance in the crime.

10. Finally, the prosecutors also improved their cross examination technique. In the first series of seminars, the prosecutors assumed that they understood how to employ the cross examination technique. In the seminars before the Rustavi and Akhaltsikhe mock jury trials, however, the prosecutors questioned their own understanding of this skill. They worked to understand the logic supporting the cross examination technique. In order to avoid engaging in argument with the witness, the prosecutors identified a three step process for conducting cross examination. First, they identified a theme for each defense witness. They determined that they would argue the witness's testimony was unreliable for one of five reasons, e.g., bias, inconsistent facts, inconsistent statements, memory or perception problems, or a history of lying. Second, based on this theme, they developed arguments for the witness. If they concluded that facts inconsistent with the witness's testimony rendered the testimony unreliable, they identified the argument they wanted to make in closing that supported this theme and identified the facts that supported it. Having identified the necessary facts, the prosecutors then focused on using the cross examination technique to ask questions that culled factual admissions from the defendant that the prosecutors used in their closing argument to support their witness theme. By developing this three-prong approach, the prosecutors avoided engaging in argument with the witness. Instead,

the prosecutors learned to save the argument for their closing when the witness was unavailable to contradict them. During cross examination, they simply obtained the factual admissions necessary to support their closing arguments.

¶11. The prosecutors also tackled specialized cross examination techniques such as cross examining an individual for inconsistent statements. A witness makes an inconsistent or incomplete statement when he testifies differently from a statement previously given to the police or other individual. The inconsistent cross examination technique consists of three parts. First, the prosecutor forces the witness to commit to the inconsistency he made during direct examination. Second, he builds up the witness's previous statement.

For example, the witness will admit that he previously spoke with the police, he told the police the truth, the importance of telling the truth, and that the previous statement was closer to the event than is the witness's testimony at trial. Finally, the prosecutor confronts the witness with his prior inconsistent statement. However, the prosecutor never asks the witness for an explanation. Instead, if the witness wants to explain the apparent inconsistency, the witness must do so on re-direct examination. This explanation typically looks very weak in light of the cross examination. The prosecutors found the possibility of an explanation during re-direct examination troublesome because they believed that it would ruin their cross examination. After much discussion, however, they agreed to try the technique notwithstanding their concerns.

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Strong is the Defense Bar. Mind What  
You Have Learned. Save You It Can.  
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¶12. The prosecutors demonstrate their renewed commitment to adversarial trial skills in the mock jury trials against members of the ABA/ROLI trained defense bar in six mock jury trials held in Rustavi. In four of these six trials, the jury convicted the defendant. After the trials, the prosecutors pleasantly listened to the juries and the judges repeat to the criminal bar the same arguments for conviction that the prosecutors had made. The juries concluded that certain witness's testimony could not be believed because the witness was biased. Furthermore, they did not trust the witness's explanation for an apparent inconsistency because the facts did not support the witness's explanation. Finally, the jurors pointed to specific pieces of evidence that the prosecutors identified as damning as the reason for convicting the defendant. The defense bar, aware of their unmitigated successes in previous trials, became angry and confused. In one instance, a judge - - in a practice trial - - ordered the court bailiff to physically remove a defense lawyer from the courtroom because he was becoming so angry and threatened violence.

¶13. The prosecutors' success continued in Akhaltsikhe. In four mock jury trials, the prosecutors convicted two defendants. Again, in those cases in which the prosecution successfully convicted the defendant, the jury repeated back to the prosecutors the same arguments and themes that they stressed throughout the case. In those cases in which the prosecutors successfully convicted the defendant, the jurors identified the same evidence to support their conviction that the prosecutors argued proved that the defendant was guilty. Moreover, the jurors also agreed with the prosecutors' witness themes. They repeated the witness characterizations back to the prosecutors. For example, they also chose not to believe a

TBILISI 00000900 004 OF 004

defense witness because he was biased. Likewise, they concluded that inconsistent facts undermined the alibi witness's testimony. In short, the prosecutors successfully used their adversarial skills to convince the jury that the evidence proved that the defendant was guilty and that the defense witness's and evidence did not undermine this conclusion.

¶14. This success does not mean that the prosecutors have concluded that additional practice is unnecessary. They still struggle with cross examining a witness based on inconsistent statements. Contrary to the three-step formula, they want to ask the witness to explain the apparent inconsistency. Each time, the witness

dutifully gives them an explanation that undermines an otherwise successful cross examination. Moreover, the prosecutors themselves recognize that they need additional practice. After the Rustavi mock jury trials, the judges, prosecutors, and defense attorneys asked DOJ/OPDAT and ABA/ROLI to prepare monthly mock trial problems. They agreed to organize and conduct monthly mock trials among themselves with these practice problems.

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May The Force Be With You.  
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¶15. Comment: The mock jury trials have generated excitement for the CPC's passage. Both defense bar and prosecution representatives have suggested that they would prefer to pass the CPC as currently drafted rather than continuing with the current Criminal Procedure Code. The defense bar and the prosecution's success in the mock jury trials demonstrate to Georgian legal professionals that they can try cases using an adversarial process. This demonstrable proof has eliminated any reservations among them regarding the passage of this new CPC. The defense bar wants the new CPC because they believe it puts them on equal footing with the prosecution and gives them a better chance to prevail. The prosecution wants the CPC because, now confident in their skills, they believe that they can still convict people based on evidence, not the absence of political connections. Furthermore, the prosecutors believe that continuous open trials, which the CPC introduces, will greatly improve the transparency of the legal system because people can observe the entire proceedings, rather than piecemeal as trials are currently conducted. Allowing the public to observe a complete trial and see all of the evidence introduced by the prosecution and watch it being tested by the defense and judge will ultimately improve the public's confidence in the prosecution and the rule of law generally. The public will observe firsthand that Georgian defendants are convicted based on objective evidence that establishes guilt beyond a reasonable doubt, and not based on their political leanings or social status. End Comment.

TEFFT